COURT OF APPEALS DECISION DATED AND FILED

May 10, 2011

A. John Voelker Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP342 STATE OF WISCONSIN Cir. Ct. No. 2007CV1153

IN COURT OF APPEALS DISTRICT III

ROBERT E. BRENNER, STEVEN J. WICKENHAUSER, CRISTY K. WICKENHAUSER, ALLAN J. SEIDLING AND SUSAN M. SEIDLING,

PLAINTIFFS-APPELLANTS,

V.

CITY OF NEW RICHMOND AND NEW RICHMOND REGIONAL AIRPORT COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Reversed and cause remanded for further proceedings*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Robert Brenner, Steven and Cristy Wickenhauser, and Allan and Susan Seidling (collectively, the Landowners) appeal an order

dismissing their WIS. STAT. § 32.10 petition for inverse condemnation proceedings.¹ The Landowners argue the circuit court applied the wrong legal standard when it concluded that there was no taking because the Landowners were not deprived of all or practically all beneficial use of their property. We agree. That standard for regulatory takings does not apply to physical occupation cases. We therefore reverse the order and remand for further proceedings.

BACKGROUND

¶2 The New Richmond Regional Airport is owned and operated by the City of New Richmond.² The airport is located on the outskirts of New Richmond, along the east side of County Trunk Highway CC, which runs north-south. In 2007, the City extended the main runway, which runs northwest-southeast, by 1500 feet. The purpose of the project was to accommodate certain types of business jet aircraft.

¶3 The Landowners all reside in the vicinity of the runway extension. Brenner and the Seidlings live on the west side of Highway CC. The Wickenhausers' land is on the east side of the highway, abutting the north end of the airport. In connection with the runway project, the City condemned sixty-two acres of the Wickenhausers' land, and also condemned an avigation³ easement over nearly four acres of the remaining eighty. The Wickenhausers' home is

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² We will refer to the New Richmond Regional Airport Commission and the City of New Richmond, collectively, as the City.

³ Avigation refers to aerial navigation.

located in the area covered by the avigation easement, which prohibits any buildings or trees exceeding twenty-six to thirty-eight feet tall, depending on their location.

¶4 The Landowners testified to various complaints about the runway expansion's effects, including odors, dust, vibrations, sound, runway strobe lights, and low overhead flights. For example, a nine-year-old resident of Brenner's home testified that she was mixing a cake for her grandmother when vibrations from a plane flying over caused the mixing bowl to vibrate off the table and break on the floor. She further testified that the noise is scary and often wakes her up at night.

¶5 Following the hearing, the circuit court issued a written decision and order. The court agreed with the parties that the City had not committed a regulatory taking. However, the court concluded the regulatory takings analysis also applied to actual occupation cases, citing *Howell Plaza, Inc. v. State Highway Commission*, 92 Wis. 2d 74, 284 N.W.2d 887 (1979) (*Howell Plaza II*). Thus, because the Landowners had not been deprived of substantially all beneficial use of their properties, the court concluded there was no taking. The Landowners now appeal.⁴

⁴ The Landowners' six-page statement of facts contains no citations to the record. Additionally, their argument recites testimony that the circuit court discounted or expressly rejected. As one example, the brief indicates Brenner testified that "the distance from the extended runway was only 298 feet from his home." Addressing that very assertion, however, the court's decision states: "The Court does not find that testimony credible when compared to exhibit[s]" showing his house is over 700 feet from the road and 816 feet from the edge of the runway. The Landowners then repeat the scenario in their reply brief, setting forth a five-page statement of facts disputing facts stated in the City's brief. The Landowners again omit any record citations and refer us to rejected trial testimony. These are significant violations of the rules of appellate procedure. Counsel is cautioned that future rules violations will result in a monetary sanction. *See* WIS. STAT. RULES 809.19(d)-(e), 809.83(2).

DISCUSSION

- Whether government conduct constitutes a taking of private property without just compensation is a question of law that we decide without deference to the circuit court. *E-L Enters., Inc. v. Milwaukee Metro. Sewer. Dist.*, 2010 WI 58, ¶20, 326 Wis. 2d 82, 785 N.W.2d 409. Whether an inverse condemnation claim has been established under WIS. STAT. § 32.10 involves the interpretation and application of a statute, which also presents a question of law. *Id.*
- WISCONSIN STAT. § 32.10 is based on Article I, Section 13 of the Wisconsin Constitution and is the legislative direction as to how the mandate of the just compensation clause is to be fulfilled. *Id.*, ¶36 (citing *Zinn v. State*, 112 Wis. 2d 417, 433, 334 N.W.2d 67 (1983)). Landowners who believe their property has been taken by the government may bring an inverse condemnation claim under § 32.10 to recover just compensation for the taking. *Id.* Section 32.10 provides in relevant part:

If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge ... asking that such proceedings be commenced. ... The court shall make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this subchapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept [it]

¶8 WISCONSIN STAT. § 32.10 "is designed solely to deal with the traditional exercise of eminent domain by the government: the government has occupied private property, plans to continue such occupation and the landowner is

merely requesting just payment for this [property]." **Zinn**, 112 Wis. 2d at 433. Thus, our supreme court explained:

To state a cause of action under WIS. STAT. § 32.10 in the absence of actual possession or occupation, this court concluded in Howell Plaza I that the facts alleged must "show that the property owner has been deprived of all, or practically all, of the beneficial use of his property or of any part thereof." We later clarified that holding in *Howell* Plaza II, concluding that short of actual occupation, there must be a legal restraint by the condemning authority that deprives the owner of all, or substantially all, of the beneficial use of his property. Therefore, under this court's jurisprudence, in order to state a claim of inverse condemnation under § 32.10, the facts alleged must show either that there was an actual physical occupation by the condemning authority or that a government-imposed restriction deprived the owner of all, or substantially all, of the beneficial use of his property.

E-L Enters., 326 Wis. 2d 82, ¶37 (emphasis added) (citations omitted).

- ¶9 The above quotation makes evident that in actual occupation cases landowners need not demonstrate they have been deprived of all or substantially all beneficial use of their property. Rather, the occupation *is* the taking. If the rule were otherwise, then public entities would rarely be required to compensate property owners for taking easements. For example, utility companies would not be required to compensate landowners for constructing high voltage electric transmission lines across their properties, and, here, the City would not have been required to pay the Wickenhausers \$24,700 for an avigation easement over four acres of their land. Indeed, WIS. STAT. § 32.09(6) and (6g) expressly provide for compensation in the event of partial takings. Moreover, subsection (6) identifies the loss of air rights as one example of compensable losses or damages.
- ¶10 The City acknowledges that low overhead flights can result in compensable takings, citing 4A NICHOLS ON EMINENT DOMAIN 105-06 (3rd ed.

2009). The City tells us this authority indicates that the majority of state courts that have dealt with airplane overflight inverse condemnation cases have held that a taking occurs only if the overflights have a direct, immediate, and substantial effect on the use and enjoyment of the land. The Landowners agree that is the proper standard for determining whether there has been a taking.

¶11 The City, nonetheless, argues there can be no compensable taking here because the FAA-approved flight path does not result in planes flying over the Landowners' homes. There are two flaws with this argument. First, it fails to address whether the recommended flight path is above other portions of the Landowners' properties. Second, it ignores testimony that airplanes deviated from the recommended path, flying directly over the homes, and the circuit court expressly found that "airplanes and helicopters use the space above the home and property of each plaintiff."

¶12 The avigation easement taken over the Wickenhausers' home states the City was taking:

[F]or the use and benefit of the public, a perpetual easement and right-of-way for the free and unobstructed passage of aircraft, and the right to cause such sound, noise, vibration, and dust as may be inherent in the operation of such aircraft, at such altitude or height above the surface of the ground in, through, and across the airspace over and above those parts of the **Condemnee's** lands which are bounded and described in the legal description

••••

[T]he **Condemnee** has been advised that the subject property is located in a noise-impacted area; that these present and future noise impacts might be annoying to the users of the land for its lawfully permitted purpose and might interfere with the unrestricted use and enjoyment of the property in its intended use; that these noise impacts might change ... by virtue of greater numbers of aircraft, louder aircraft, seasonal variations, and time-of-day

variations; that changes in ... procedures or in airport layout could result in increased noise impact; and that ... personal perceptions of the noise exposure could change and that his or her sensitivity to aircraft could increase.

- ¶13 We take note of the avigation easement language for two reasons. First, it demonstrates that the taking, and compensation therefor, was limited to only that part of the Wickenhausers' property identified in the easement. Thus, we need not concern ourselves with the City's argument that the Wickenhausers would be necessarily recovering twice if an inverse condemnation proceeding was commenced. It is clear that they cannot now recover for any taking except any that concerns the remainder of their property.
- ¶14 Second, it would appear the easement language may be beneficial in determining what effects might be properly considered when determining whether a taking occurred. While the ultimate determination of whether there has been a taking is a legal one, it depends on adequate findings of fact. Because here the circuit court's factual findings were provided in the context of an improper legal standard, we remand to the circuit court. The court may make further findings of fact as necessary and shall determine whether there was a partial taking.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.